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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE **Law and National Security**

INTELLIGENCE REPORT

Volume 4, Number 7 | Morris I. Leibman, Chairman | July 1982

Intelligence Identities Protection Act Signed Into Law by President

On June 3, H.R. 4, the Intelligence Identities Protection Act, was approved by the House by a vote of 315 to 32. On June 10, it was approved by the Senate by a vote of 81 to 4. On June 23, it was signed into law by President Ronald Reagan. And so, after a three year battle, our intelligence community is at last protected by a law which makes it a criminal offense to identify and expose covert agents of the United States intelligence agencies "with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." This puts the clear brand of illegality on the systematic identifying activities of people such as Philip Agee and publications such as *Counter Spy*.

In signing the measure, President Reagan said that the new law would send a "signal to the world that while we in this democratic nation remain tolerant and flexible, we also retain our good sense and our resolve to protect our own security and that of the brave men and women who serve us in difficult and dangerous intelligence assignments."

The House and Senate debates, when the bill was considered, were based on the report submitted by the conference committee. Despite the fact that there appeared to be only minor differences between the Senate and House versions of the Intelligence Identities Protection Act (H.R. 4 and S.391), the conference report took a long time to prepare because, as Representative Boland stated, the conferees wanted to make sure that the report was in harmony with the previous legislative history of the measure. The conference committee, said Boland, went through the entire record of committee hearings and Congressional debate on the subject in the 96th and 97th Congresses. "Every word was scrutinized and carefully considered."

We reproduce below a few paragraphs from Boland's statement in which he discusses the several changes that were made in conference, and also discusses his conversion to a belief in the constitutionality of the measure—which incorporates the Ashbrook amendment that Boland had strongly opposed.

> The principal effort of the conferees concerning this bill was to resolve this particular issue in terms of the statement of managers' language

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Well Done, Max Kampelman

The entire membership (78 Senators and Congressmen) of the Commission on Security and Cooperation in Europe of the Congress of the United States has signed a letter to President Reagan commending the admirable performance of Ambassador Max Kampelman and the entire U. S. delegation to the recently recessed meeting of the CSC in Madrid. The letter states, in part:

> It is rare that we in the West have such a splendid opportunity to demonstrate to the world the fundamental difference between the Soviet and Western systems of government: freedom. For 18 months, the American delegation, ably led by Ambassador Kampelman, represented the cause of freedom and human rights with conviction and compassion.

Ambassador Kampelman is a member of the Committee on Law and National Security all of whose members join the Congressional Commission in congratulating him and his associates.

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Intelligence Identities Protection Act

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explaining section 601(c), particularly its two principal elements – the terms "pattern of activities" and the "reason to believe" standard.

Substantively, the conference report which we bring back to the House is the House bill with several exceptions. We have accepted the Senate amendment which permits an individual to disclose information that solely identifies himself as a covert agent. We have accepted the Senate amendment limiting the definition of covert agent to active officers or employees of intelligence agencies and to present agents, sources and informants. We have accepted a substitute cover section that resolves the concerns of the other body, about the protection of the Peace Corps from use for intelligence operations....

As one who had serious doubts about the constitutionality of this bill as it passed the House, and who returns with a conference report substantially similar to that bill, I must say that, based on the interpretation of this statute as provided in the statement of managers, I believe that this statute can be considered constitutional. I believe that it has a good chance to withstand the test of judicial scrutiny. It can do so because of its narrow focus and explicit avoidance of proscribing protected speech.

The debates which took place in both the House and Senate constitute an important part of the legislative history of the measure. We shall summarize them here briefly in the interest of underscoring those points that appear to add significantly to the legislative history already established.

Debate in the House

Only two members of the House, Representative Don Edwards (D-Calif.) and Representative Theodore S. Weiss (D-N.Y.), spoke against approval of the conference report. Among the many representatives who spoke in support of it, there was a significant difference on one point only.

Mr. Henry Hyde, the ranking member of the Civil and Constitutional Rights Subcommittee, and Mr. Robert McClory, both Republicans from Illinois, expressed concern that the language of the statement of managers at one point appeared to weaken the clear intent of section 301(c) of the legislation, which deals with violations committed by non-employees of the United States government. (The conference committee report deals essentially with the manner in which differences were resolved. It is followed by a "statement of managers" – actually the conferees – which deals with interpretation.)

Mr. Hyde put the matter this way in his opening statement:

I must part company with the letter and spirit of much of the statement of managers accompanying this conference report. The clear import of most of that statement is that an additional motive or a certain status may negate the criminal state of mind we have outlined. This is a premise I firmly reject.

In one instance, the statement of managers correctly notes that "the fact that a defendant claims one or more intents additional to the intent to identify and expose does not absolve him from guilt." This means, Mr. Speaker, that so long as the defendant possessed this requisite intent, his additional intents are not exculpatory. Remarkably, and unfortunately, the bulk of the statement of managers suggests just the contrary; that certain beneficient motives would necessarily negate the intent to identify and expose covert agents.

Mr. Speaker, I cannot envision a case, no matter how heinous, where the defendant will fail to assert a paramount goal to justify his action – some "redeeming social value." ...

I urge my colleagues to vote in favor of the conference report, but, at the same time, I urge the courts to consign the statement of managers to the oblivion it deserves, and take solace at the fact that the clear language of this legislation requires no obfuscatory interpretation as proffered by the managers' statement.

At a later point, in an extensive colloquy with Mr. Hyde, Mr. McClory, however, quoted the following passage from the statement of managers:

Of course, the fact that a defendant claims one or more intents additional to the intent to identify and expose does not absolve him from guilt. It is only necessary that the prosecution prove the requisite intent to identify and expose covert agents.

The emphasis on this quotation was obviously intended to underscore the real intent of the legislation for the legislative history.

It is known that a number of conservative Congressmen are inclined to share the misgivings expressed by Mr. McClory and Mr. Hyde. Others are inclined to feel, however, that the McClory-Hyde misgivings are exaggerated and that the intent of the legislation is made unmistakedly clear by the paragraph quoted by McClory. Some thought it confused the issue. Mr.

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Federal Tort Claims Act Scheduled for Mark-Up

The Senate Judiciary Subcommittee on Agency Administration will soon be ready for a mark-up session on S.1775, described as *a bill to amend title 28 of the U. S. Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts, and for other purposes.* An effort is being made to achieve a consensus before the mark-up session is convened.

The legislation, which was introduced by Senator Charles E. Grassley (R-Iowa), is intended to rectify a situation which has been growing in magnitude and seriousness for more than a decade. Senator Grassley chairs the Subcommittee on Agency Administration.

In 1971, the Supreme Court ruling in *Bivens v. Six Unknown Named Agents,* opened the floodgates to suits charging individual employees of the federal government with violating their constitutional rights. Since that time, over 2,200 separate "Bivens" suits have been filed, most of them involving multiple defendants, some of them as many as 35 or 45. Every month sees 50 or 60 new suits filed against officials of various departments in the federal government. The sheer magnitude of the phenomenon casts a shadow over every government official, especially those in the investigative agencies and those who have to do with personnel evaluation and selection.

Testifying before a Senate subcommittee in November 1981, William H. Taft IV, the spokesman for the Department of Defense, said:

> The threat of lawsuits is a daily companion of members of the Department, from the most senior officials of the Office of the Secretary of Defense, the military departments, and the defense agencies, to operational military and civilian personnel in the field. The potential of time-consuming and expensive litigation may distort the Department's decision-making processes, while actual cases divert Department of Defense employees from their primary mission, the protection of the national security....
>
> Psychologists who must assess the reliability of applicants and employees are particularly troubled by the specter of personal liability....
>
> They and their colleagues are particularly concerned about the fact that their private insurance does not protect them against punitive damages. According to the Agency, the professional judgments of its staff psychologists may be influenced by their perception of the risk of litigation and personal liability.

The majority of the "Bivens" suits brought against government employees have been dismissed in the courts. However, some ten or more have resulted in verdicts against the defendants. That is enough to inspire fear in many thousands of others.

S.1755 is strongly supported by the executive branch, in particular by the Department of Justice, the Department of Defense, and the law enforcement and intelligence agencies. It is also strongly supported by organizations such as the Senior Executives Association and the Federal Managers' Association. On the other hand, it is strongly opposed by organizations such as the American Civil Liberties Union and the Institute for Policy Studies.

Mark H. Lynch, staff attorney for the American Civil Liberties Union, told the Grassley subcommittee that the legislation was probably unconstitutional because it deprived victims of unconstitutional actions of the right to redress by jury trial. [This, of course, is inaccurate. The legislation simply provides that suits for redress should be brought against the federal government rather than against individual employees who have acted in good faith.]

Thomas Devine, legal director of the IPS's Government Accountability Project, testified before the Grassley subcommittee that "Without the threat of damages, an unscrupulous federal official has nothing to lose by wholesale assault on constitutional rights."

To this statement, G. Jerry Shaw, president of the Senior Executives Association, replied that the government employee who violates the constitutional rights of American citizens already has much to lose, including his job, his reputation and his employability.

The Justice Department's rationale in supporting S.1775 was spelled out by Deputy Attorney General Edward C. Schmults in his testimony before the Grassley subcommittee last November. We reproduce below excerpts from his statement:

> In 1971, the Supreme Court, in *Bivens v. Six Unknown Named Agents,* declared that congressional authorization was not required to expose individual federal officials to personal liability for violations of fourth amendment rights. Since that decision, there has been an exponential increase in the number of lawsuits seeking redress directly from the individual defendant's personal resources, rather than from the government.
>
> The United States can generally invoke sovereign immunity as a defense in *Bivens* suits,

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Federal Tort Claims Act

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which are popularly labeled "constitutional" tort actions. The hallmark of a constitutional tort claim is a complaint against a public official seeking damages for an alleged violation of the Constitution, such as the fourth or fifth amendment.

The Supreme Court has repeatedly widened the exposure of federal officials to damage liability for constitutional torts since Bivens....

Subordinate federal courts have extended the *Bivens* constitutional tort theory to claims bottomed on virtually any constitutional infraction....

Initially, *Bivens* suits were primarily filed as a result of incidents involving law enforcement activities; in recent years, however, such suits increasingly have arisen out of regulatory or personnel actions taken by federal officials.

A U.S. district court ruling in 1980 holding members of the former Civil Service Commission potentially liable under the fifth amendment for allegedly disclosing derogatory allegations against a job applicant to another agency without notice and an opportunity to be heard is exemplary of this trend....

The existing law of government and employee tort liability lacks any organizing or coherent principles. While the driver of a negligently driven government vehicle is shielded from suit, the president and certain members of the U.S. Senate have been sued as individuals for monetary damages based on the allegedly wrongful disposal of the Panama Canal. While an employee cannot be sued for the unlawful seizure of a seagoing vessel, an employee can be sued for the wrongful seizure of other items.

While tax collectors in some circumstances are immune from suits, customs collectors are not. Government lawyers in those instances in which they represent individuals can be sued for malpractice. Most government doctors cannot....

The specter of personal lawsuits depresses morale, chills vigorous and effective public action, and unfairly burdens the conscientious public official in executing his or her federal duties. (Emphasis added.)

Augmenting these problems is the fact that the Federal Tort Claims Act generally does not foreclose lawsuits against both the government and individual federal employees for common law or nonconstitutional torts. Moreover, no general provision exists for indemnification of a sued federal official. Thus, a federal official must daily confront the hazard of incurring personal financial loss for actions taken in the course of duty.

The victim of a constitutional tort is equally disserved under existing law. Litigating a constitutional claim is expensive, exhaustive, and unlikely to result in a collectible judgment against a federal employee. The government is liable only for intentional torts arising from assault and battery, false imprisonment, false arrest, malicious prosecution, and abuse of process, and then only if the tortfeasor is an "investigative or law enforcement officer." Even if successful, the plaintiff has difficulty proving substantial actual damages from the violation of a constitutional right, and if the damages can be proven, government employees ordinarily would be unable to pay.

Finally, the present system of employee liability is also counterproductive for the government. The *Bivens* action entails expenditure of large resources and great complexity in the defense of individuals. Although employees acting within the scope of their employment are defended by Department of Justice attorneys, the government often must retain private attorneys when ethical considerations preclude representation by government attorneys....

These manifold flaws in the current law of official liability would be removed by the enactment of S.1775, and we enthusiastically endorse the bill....

Regrettably, areas of legal certainty are diminishing, and eliminating a good faith defense could discourage progressive and enlightened policies in numerous areas where the law is unfolding or equivocal for fear of financial liability....

In summary, I would emphasize once again that this legislation initiative offers a meaningful, attainable remedy to a citizen who has suffered a constitutional deprivation. At the same time, it dispels the cloud of potential personal liability that currently hangs over almost every federal public servant. Through this legislation, the citizen can obtain redress and the public official can conscientiously perform his mission. The citizen, the government and the public are all the beneficiaries.

The House version of the Federal Tort Claims Act, H.R. 24, is also ready for mark-up. It is identical to the Senate bill in major respects but there are two significant differences: (1) it provides attorneys' fees for

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plaintiffs whose constitutional rights are found to have been violated, whereas the Senate bill does not; and (2) it provides that, where constitutional rights are found to have been violated, the government cannot argue "good faith."

As we go to press, the Supreme Court on June 24, by a vote of 5 to 4, ruled that presidents may not be sued for monetary damages if they violate the law or violate citizens' constitutional rights. The decision came as the result of suits brought by a Pentagon analyst, Ernest Fitzgerald, against President Nixon and his aides, Bryce N. Harlow and Alexander P. Butterfield. In the cases of the *Harlow v. Fitzgerald* and *Butterfield v. Fitzgerald* suits, the court, however, refused to grant similar immunity. In doing so, the court's decision sought to place restraints on future suits against government officials and employees by imposing two conditions. The majority decision said that presidential aides only enjoy the same "good faith" immunity that protects other officials.

In the interest of protecting government officials and employees against frivolous suits, the court's decision said that such suits should be entertained by the courts only when there has been a clear breach of the law or of constitutional safeguards, and only if these were "clearly established at the time an action occurred."

Sponsors of the legislation feel that the court ruling strengthens their case by underscoring the need for a new law in the Federal Tort Claims area.

Hobson et al v. Wilson et al: A Case History

One of the most interesting of the "Bivens" suits still pending in the courts, *Julius Hobson et al v. Jerry Wilson et al* (Slip Opinion, Dec. 23, 1981, D.C.D.C.), goes back to July 1976. In that suit, the Washington Peace Center and five anti-Vietnam militants, including Julius Hobson and Arthur Waskow of the Institute for Policy Studies, brought suit against former Washington Police Chief Jerry Wilson plus several of his aides and five retired FBI officials, including Charles D. Brennan, former chief of the FBI's Internal Security Section, and George C. Moore, former chief of the Racial Intelligence Section. The plaintiffs charged that the federal defendants, through their participation in the FBI's "Black Hate" and "New Left" COINTELPRO (Counterintelligence) programs, had engaged in a conspiracy to violate their first amendment rights of association.

Defendants and counsel repeatedly made the point that the two COINTELPRO programs in question were approved by the director of the FBI in an effort to counteract the growing threats of violence by groups such as the Black Panther Party and Students for a Democratic Society and that "the only common threads tying the federal defendants together was their employment with the FBI and their obligation to carry out their respective duties established by their superiors, including the director of the FBI and the attorney general," that they were acting under orders of and as part of a single entity, the FBI, and that there could not therefore have been a conspiracy. Nevertheless, the D.C. District Court, on December 23, 1981, *supra,* returned a verdict in favor of the plaintiffs and awarded damages aggregating $711,937.50 for the Metropolitan Police Department defendants and the five former FBI officials. The jury found that each of the defendants had, by both conspiratorial and individual action, injured each of the eight plaintiffs, and found each defendant liable to each plaintiff. Two-thirds of each award was designated as compensatory damages and one-third as punitive damages. In the case of the FBI defendants, the damages assessed ranged from $75,000 against Charles D. Brennan to $37,500 against Gerald T. Grimaldi.

On January 3, 1982, the Department of Justice, acting as counsel for the defendants, sent a lengthy memorandum to the United States District Court of the District of Columbia, asking the court "to set aside the verdict and judgment entered on December 23, 1981, and to enter judgment in favor of these defendants, or, alternatively, to set aside the verdict and judgment and grant the defendants a new trial."

On June 1, 1982, the District Court denied the defendants' motion on all points. It is about certain that the Justice Department will appeal the verdict, but the appeal must wait upon a court decision on two requests made by the plaintiffs: (1) that their files be destroyed, and (2) that the court grant an injunction against the reinstitution of any COINTELPRO program. The Justice Department will argue that an order to destroy the plaintiffs' files would run counter to a pending order from Judge Harold Greene instructing the FBI to destroy no files. They will also argue that an injunction to prevent the reinstitution of COINTELPRO programs is superfluous because there are no plans for the reinstitution of such programs.

Meanwhile, plaintiffs have filed another motion requesting attorneys' fees in the amount of $500,000. Under the current policy of the Justice Department, in a case such as this, the U.S. government would not pick up the tab if attorneys' fees were assessed against the defendants. With a view to avoiding a conflict of interest, the Department of Justice has advised the defendants to retain private counsel, who would be in a position to argue that the U.S. government rather than the defendants individually should assume the liability.

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National Security: The War of Ideas

By Morris I. Leibman

Editor's Note: At an elegant dinner at Washington's Chevy Chase Club, complete with music, flowers and accolades, nearly 200 friends paid tribute to Morry Leibman, retiring chairman of the ABA Standing Committee on Law and National Security. Encomiums, eulogies, panegyrics and just plain praise were spoken by Bill Mott, Dave Abshire, John Norton Moore, Dan McMichael, Marty Hoffman and Frank Barnett. Justice Lewis Powell, a former chairman who was unable to be present, sent an especially warm message. Chairman Leibman, ever modest, remarked as he rose to respond, "May God forgive you for your exaggerations and forgive me for enjoying them." Excerpts from Mr. Leibman's remarks follow.

Thirty-two years ago, one of our predecessor special committees began to call attention to communist tactics, strategy and objectives. Twenty-one years ago, another predecessor special committee devoted its energies to education about communist threats and aims. We of the Standing Committee on Law and National Security, which combined the functions of the two special committees, conducted educational programs for the Bar and highschool teachers about the contrast between totalitarianism and liberty under law. I have had the privilege of serving as chairman of the standing committee's efforts for two separate terms, totaling 12 years.

The threats, dangers and challenges of Kremlin imperialism were not well recognized or accepted during those years. I choose the words Kremlin and imperialism so that we do not get bogged down in technical discussions of whether imperialism is Russian Communism or just generic totalitarianism. We thought the threat was real.

In 1966, we published "Peace or Peaceful Coexistence," authored by Richard Allen. In the course of explicating the true aggressive nature of communist plans, under the rubric of "peaceful coexistence," Allen quoted Secretary of State Rusk:

> The leaders of both of the principal communist nations are committed to the promotion of the communist work revolution, even while they disagree bitterly on tactics . . . we should not forget what we have learned about the anatomy and the physiognomy of aggression. We ought to know better than to ignore the aggressor's openly proclaimed intentions, or fall victim to the notion that he will stop if you let him have just one more bite or speak to him a little more gently.

Sir Winston Churchill, warning the world of the menace of Nazi totalitarianism, remarked that:

> The German dictator, instead of snatching the victuals from the table, has been content to have them served to him course by course.

The inexorable march of communism would similarly be content to destroy the West, bit by bit, undaunted by the miseries inflicted upon teeming millions. When Churchill uttered his dire warning, in 1938, he was ridiculed for being too dogmatic and inflexible. Most leaders sincerely believed that he had gone too far, that Nazi totalitarianism could be contained through good will and negotiation. Cruel experience taught us a different lesson indeed.

In April 1978, on the occasion of the one-hundredth anniversary of the American Bar Association, we published "The Economic and Military Balance Between East and West, 1951-1978." One of the authors, Ed Luttwak, is here this evening.

In the preface, I called attention to Alexander Solzhenitsyn's words, in his historic Harvard address:

> The fight, physical and spiritual, for our planet . . . has already started.

Luttwak, in discussing western military weakness in that fight said:

> In fact, as the military position of the United States has continued to deteriorate . . . as the military balance changes, so do attitudes and expectations in the minds of political leaders and opinion-makers world-wide. As the Soviet Union has become more powerful relative to the West, those who shape the course of world politics have revised their notions of the proper and legitimate sphere of Soviet action. In fact, power itself legitimizes action in the reality of world politics; later, some principle or other can always be found to give formal legitimization in retrospect. But even in the absence of any actual attacks, Western interests world-wide are already being eroded by the psychological—and therefore, the political effects of Soviet military superiority.

The perpetual imperialism is evident today in Poland and Afghanistan. The Polish situation, in particular, presents many complexities and ambiguities. One of those ambiguities was a common reaction, which said, "I hope the Poles don't go too far."

What was the true import of those words? Did it mean that it was hoped that the Poles would not want too much freedom of speech, or freedom of the press, or other civil liberties? Or, was there something even more troublesome about the sentiment; to wit, don't

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Tributes to Chairman Morris I. Leibman

Morrie Leibman: a very special guy

Georgie Anne Geyer

WASHINGTON—The elegant testimonial dinner at the Chevy Chase Country Club could have been any recent posh Washington party. But this one was special because so many of the high-level movers and shakers present were moving and shaking from the far right to the liberal left.

The man who had brought them together was in everybody's book a very special guy. His name is Morris Leibman. He is a great deal more than just a top-level partner in the prestigious Chicago law firm of Sidley & Austin.

As one of the speakers that night said, as "Morrie" sat there with his usual blend of pixieish charm and humility, Leibman helped us all "to avoid a hardening of the categories." Important words for today.

Or, as Richard Friedman, a lawyer who worked with him, put it afterward, "Today . . . we fall into the trap of pigeon-holing everything. If you're a Democrat, you do this; if you're a Republican, you do that. These designations are not very helpful. Then you get to a guy like Morrie Leibman, who's a Democrat and a humanist, and he's all over the place. Some issues require a very hawkish stance, some a dovish stance."

Morrie Leibman is a short man with a roguish smile and seemingly infinite energy. He has served five presidents as a behind-the-scenes adviser, and last October Leibman, a Democrat, received the Presidential Medal of Freedom from a Republican president. He is a kind of Bernard Baruch for our times, one of those men who play an immeasurable role in forming, advising and moderating the decisions of the top men of power from a rational, lay position outside.

But most important, as everyone stressed at the testimonial for him, he was one of those men who built bridges between ideological extremes, a man who understood and acted upon the "sense of process" that alone makes democracy workable, a man who never dealt in theoretical extremes.

How did he do this? In his many years of public service, perhaps his most recognized role is chairman of the American Bar Association's Standing Committee on Law and National Security. But he has also served as civilian aide-at-large to the Army secretary and in innumerable important advisory roles.

It was Leibman who used his vast web of connections and his easy charm to bring Henry Kissinger to Chicago on three occasions to meet off-the-record with top businessmen. It was Leibman who suggested to Alexander Haig the name of Leon Jaworski for Watergate prosecutor. In short, Leibman has been a kind of wise civilian conscience for a lot of people who could be lost in heady waters.

His national security committee is almost singlehandedly responsible for creating the new body of law on intelligence. An example: the new laws that forbid a person or publication to reveal an intelligence agent's identity. These laws could have gone to the foolish left or the cruel right, but because of Leibman's agility they came out in the reasonable middle.

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THE EYE

About 150 of some of Washington's best and brightest showed up at the Chevy Chase Club last week to honor Morrie Leibman on his retirement from the Chairmanship of National Security Committee of the American Bar Association. Some of those who would have liked to have been there weren't. Justice Lewis Powell, who is sort of the godfather of the committee, couldn't make it. Amb. Jeane Kirkpatrick was on the guest list, but Eye presumes she was too busy communicating with Al Haig to get there. Dick Scaife, who has generously helped fund the committee couldn't get down personally, but he sent aides Dan McMichael and Dick Larry. Dick Allen was off in Tokyo, but he sent greetings.

But let's get back to Morrie Leibman, who served as chairman of that committee for 12 of the 30 years that it has been in existence. Morrie hails from Chicago, but he has spent a lot of time around Washington giving good advice, especially on national security matters. He survived a serious heart attack a couple of years ago and is looking great. He responded to all the nice things that Bill Mott, Frank Barnett, David Abshire and Dan McMichael said about him, saying, "May God forgive you for your exaggerations and forgive me for enjoying them." Looking back, Morrie noted that the country is in greater peril today than it was when the committee was launched thirty years ago. He observed that the dangers posed by Red totalitarianism are real and that the big struggle today is for the minds of men.

Among those who nodded agreement were Admirals Arleigh Burke and Tom Moorer, Richard Pipes of the National Security Council, Ed Luttwak, Alan Weinstein, Generals Arthur Trudeau, Ed Rowny and Larry Williams, FBI chief William Webster, Fritz Kraemer and son Sven, and Owen Frisby and son Robert.

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upset the Soviets—they're tough—they won't be pushed around—they'll strike back?

Are we really saying that we respect power in the hands of the Soviets and object to it for ourselves? Are the same people bowing to Soviet military might, and opposing it in the United States?

For too many years, we were quiet and almost apologetic because we were seen by some as doctrinaire, or alarmist, or right-wing. Or, at a minimum, we were controversial.

To the eternal credit of the American Bar Association, the officers, Board of Governors and the House of Delegates supported and stayed with our efforts to preserve our national security. I don't know of many other national, professional or business associations that have maintained such a vigorous, continuing effort.

It is relevant on this occasion to ask whether the United States is more secure today than when we began our work in the 50's and 60's. During the years of our existence, we had the Korean war, and the negotiations, in Panmunjom, still continue.

We had Vietnam, and the totalitarians from the northeast now occupy Laos and Cambodia. In Europe, we had Hungarian and Czechoslovakian uprisings, and now, Poland. We have been witnesses to the rape of Afghanistan, and the introduction of Soviet surrogate armies throughout the Middle East and Africa. To the south, we have watched Soviet mischief-making in Central and South America, and Castro still rules with an iron fist in Cuba.

Soviet military power has grown to the point where their Backfire Bombers now fly off the coast of Cape Cod, and their naval forces patrol the seven seas. In addition to their burgeoning conventional forces, the U.S.S.R.'s military escalation now includes the world of satellites, outer space, laser weaponry, and a vast array of nuclear missiles.

The Soviet push to create a military machine, second to none, has been very successful and has been matched by a total and continuous ideological thrust. The terrible military juggernaut, which we and the rest of the civilized world so foolishly, so supinely, so insensately allowed the Soviet leaders to build up year by year from almost nothing, cannot stand idle, lest it rust or fall to pieces. It must be in continual motion, grinding up the human lives and trampling down the homes and the rights of millions of Poles, Afghans, Cambodians and Nicaraguans.

The dual challenge of military force and ideological warfare must be faced in the period ahead. We lawyers must help to articulate the realities. Totalitarianism is real.

Anti-red imperialism is not anti-intellectual. The real struggle is for the minds of men. The cold war is the opposite of cold war. It is the competition of ideas. It is the dialogue of civilization. It is the unending fight for human rights, pluralism and the survival of free societies. Our understanding and appreciation of the moral and philosophical nature of our law society is essential.

One of our most important contributions has been to identify a new body of law called national security law. It began with the recognition that there is a real external threat to our free society. The challenge was to take steps to protect our society without destroying the essential nature of our institutions. This was particularly within the competence and responsibility of the American legal community.

A professor of law, who attended one of our workshops, stated it well in a recent letter to me. He wrote:

> The law of national security is that body of jurisprudence, legislation and judicial decisions which define the actions a State may take in order to protect its vital institutions, interests and security, against both domestic and external challenges . . . contrasted with the branches of the criminal law which seeks to protect life, the person, the habitation, property, morality and health; the law of national security is designed to safeguard the communal sovereignty . . . Despite the controversial background of national security legislation in this country, the need for the protection of our fundamental institutions cannot be denied. It is evident that in the education of future members of the country's Bar, the issues of national security must gain requisite attention, as much as issues of poverty, sexual discrimination, environment and mental health.

We lawyers are particularly well trained and suited for the educational task. As Lord Acton once wrote, "The law of liberty tends to abolish the reign of race over race, of faith over faith, of class over class. It is not the realization of a political ideal: it is the discharge of a moral obligation."

I am sure that the committee, under the leadership of John Norton Moore, will continue to lead this vital effort.

Thank you.

The next **Law Professor Workshop**, on the subject of the new international economic order, will be held at Saint Louis University School of Law on December 10-11.

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Book Reviews

The American Magic: Codes, Ciphers and the Defeat of Japan by Ronald Lewin, Farrar, Straus and Girouk, New York, $14.95

By Your Editor

This book is of particular interest to lawyers because it describes (pp. 141-143) the very large part they played in the handling of signal intelligence. In the aftermath of the Pearl Harbor catastrophe, where our evaluation and distribution of "sigint" was something less than brilliant, lawyer and Secretary of State Henry L. Stimson (he who once decried reading other people's mail) decided the problem was "there was no real system." He "realized that a major cause [of what happened at Pearl Harbor] had been the haphazard unsophisticated handling of signal intelligence."

Characteristically, says Lewin, "Stimson decided that there must be a total review of the situation and that this would best be carried out by a highly qualified lawyer, thoroughly equipped to assess and expound large cases involving complicated facts." For the task he picked, in January 1942, one of the outstanding leaders of the New York bar, Mr. Alfred McCormack. Responsible only to Secretary Stimson, McCormack's assigned task was "to determine what must be done in order to make signal intelligence operations meet the requirements of war and to insure that all possible information was sucked from that source."

The official History of the Special Branch, Military Intelligence Service, bears witness to the clarity and importance of McCormack's investigation and recommendations. They provided nothing less, says historian Lewin, "than the birth certificate and the charter for the Special Branch" which "through McCormack, was responsible directly to the Secretary of War and to the Army Chief of Staff, General Marshall, on whose iron support it could consistently rely."

Part of Mr. (later Colonel) McCormack's investigation took him with Colonel (later law professor) Telford Taylor and William Friedman of MIS to Bletchley Park, headquarters in England for collection, evaluation and distribution of signal intelligence. The team stayed at Bletchley for two months, and so impressed were they with the "British reading of the German Enigma-ciphered signals and of the smooth, secure way in which that intelligence was processed and distributed to headquarters at home and to commands in the field," that they decided to adopt the system.

The Special Branch history is explicit as to the results of the adoption:

> It was only through the adoption of such principles and methods that the U. S. Army was able to get full access to the results of the British signal intelligence operation and adherence to those principles and methods had a great deal to do with persuading the U. S. Navy to make available in full the traffic turned out by it.

And what of the Navy during all this period of Army signal intelligence reorganization? It had its own giants in the field: Captain Safford in Washington (OP20G), Commander (later Rear Admiral) Eddie Layton, Fleet Intelligence Officer in the Pacific, and Captain Jasper Holmes at the Combat Intelligence Center in Pearl Harbor. Liaison between these giants and their counterparts in the Army and indeed, as Lewis recounts, "between the Army and Navy [generally] over signal intelligence was often indifferent." It certainly was indifferent prior to Pearl Harbor as this reviewer, then handling "magic" in Naval Intelligence, can attest.

Both the Army and Navy had their intelligence evaluation and distribution problems prior to Pearl Harbor. Magic intercepts (broken diplomatic codes) available in Washington were not sent to Admiral Kimmel and General Short in Hawaii. Had they been, those two officers suggested at the Pearl Harbor Investigation, they would have grasped their significance and been more alert and ready for the attack. In Lewin's view, "This is extremely doubtful." It cannot "be easily believed that on receipt of them Kimmel and Short would have smelled a strong scent of danger."

Lewin explores the murky world of *what might have been,* but concludes "nothing convincing has been disinterred by subsequent researchers—to pinpoint Pearl Harbor as a target for the (Japanese) carriers." His dismissal of "what might have been" is akin to the words of Rossetti from *The House of Life.*

> My name is Might have been;
> I am also called No more—Too late,
> Farewell.

It is not surprising that Lewin rejects the conspiracy theory as pure "moonshine." "There is a simple test," he says. "To achieve so malign a purpose Roosevelt would have been unavoidably compelled to carry with him General Marshall, the Army Chief of Staff, and Admiral Stark, the Chief of Naval Operations." Anyone, he suggests, who thinks George Marshall, upright, honorable and incorruptible leader "could have been persuaded even by a president to mislead his subordinate commanders, by the devious suppression or distortion of vital information, in order to precipitate a war with Japan—the last thing he wanted—is living in a dream world." In this reviewer's opinion those words apply to Admiral Stark in spades. A more honorable, truthful, considerate naval officer never lived. Deceit was not in his nature.

But this book is principally about the successes

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(and occasional failures) of signal intelligence in the Pacific. Lewin concludes (p. 17), "The cryptanalysts did not win the Second World War on their own. But in the Pacific (as on the German fronts) the end came years earlier, and many thousands of lives were saved because of their ability to read the enemy's signals."

If there is a pre-eminent hero (among many) in this book it is Eddie Layton, Admiral Nimitz's intelligence officer. He is mentioned and credited no less than fifteen times. There were many heroes, unsung and unrecognized, like Commander Joe Rochefort, Eddie's close friend, who contributed to sigint in diverse ways, and ended up on the Navy's ashheap. But the partnership of Layton and Rochefort produced dividends any company would envy.

Take Midway, for example. Eddie and Joe reported to Nimitz that they were confident from an analysis of sigint "that an assault on Midway, involving an amphibious operation, was being planned for the near future."

Thus, Admiral Nimitz, says Lewin, "on the eve of his next great battle (Midway), had a more intimate knowledge of his enemy's strength and intentions than any other admiral in the whole previous history of sea warfare." This is not to denigrate in any way the brave execution of the battle on the part of Admiral Spruance and company; it is merely to state the tremendous advantage they had over the Japanese at the outset. As the U.S. Naval Intelligence after action report asserted: "Claims made ever since the last World War by Combat Intelligence experts in every nation of the world as to the usefulness of cryptanalysis and the traffic analysis during the course of a sea battle, were proved beyond further doubt at Midway."

But all was not beer and skittles in the application of signal intelligence in the Pacific. In a chapter entitled "The Stab in the Back," Lewin describes the publication in *The Chicago Tribune* of the infamous Stanley Johnston article disclosing publicly that the Navy had broken the Japanese naval codes prior to Midway. A grand jury was convened and it looked as though a major confrontation between freedom of information (Colonel McCormick and the *Tribune*) versus security (President Roosevelt and the Navy) was just around the corner in the courts. Lewin is wrong when he states "there was *and still is* within the American legal edifice no room where cases involving the security of the state can be examined *in camera* without the presence of the public or the media and with no possibility that the proceedings will be reported." The recent Felt-Miller trial denies this. It was plain, however, that any kind of a trial would have jeopardized the Navy's attack on the as yet unbroken JN25 Naval code. Cryptanalysts persuaded the president to drop the trial so it was quashed. Just ten months later, the JN25 code solved, Admiral Yamamoto, the architect of Pearl Harbor, was shot down by P38's over Rabaul. Magic led our planes to intercept him.

It was not long after Colonel McCormack's institution of the Army's Special Branch that the Navy sigint system became fully integrated and cooperational with the Army. Again a lawyer, Edwin A. Huddleston Jr., recruited by McCormack, was instrumental. He was assigned to Hawaii with the task of building a liaison with the Navy, which meant establishing relations with the Joint Intelligence Center, Captain Layton as Fleet Intelligence Officer, and Captain Holmes at the Combat Intelligence Center. An area of mutual trust with the Navy staff gradually emerged. As Captain Holmes observed (in 1945) in his official narrative of the Combat Intelligence Center, "The Army Special Branch system of primary distribution of radio intelligence is a model for the Navy to follow." And so the Army Special Branch and the intelligence activities under Admiral Nimitz were fully integrated to the mutual advantage of both.

It was a different story in the southwest Pacific under General MacArthur. He resisted all efforts by Washington and his supervisors in the War Department to place Special Branch Intelligence officers *in* his command but not *under* his command. Author Lewin has little good to say about MacArthur and his intelligence officer, General Willoughby. In fact, he states: "Of all the allied theaters of war his is, perhaps, the one in which Ultra [magic] had the most checkered history." He sums up his analysis of MacArthur through the eyes of his countryman, Lieutenant Colonel Wilkinson. Wilkinson, the General's British liaison officer, reported in late 1943 through MI6 channels to Winston Churchill about MacArthur, "He is very shrewd, selfish, proud, remote, highly-strung and *vastly vain*. He has imagination, self confidence, physical courage and charm, but no humour about himself, *no regard for truth, and is unaware of these defects*. He mistakes his emotions and ambitions for principle. With moral depth he would be a great man. As it is he is a near miss, which may be more than a mile . . . his main ambition would be to end the war as pan-American hero in the form of generalissimo of all Pacific theatres."

If prejudice speaks in the foregoing analysis, it is that of a British intelligence officer and not of the American Navy, so often critical of MacArthur. The General's achievements from Corregidor to Inchon speak for themselves. In the field of sigint, after some initial protests about wishing every facet of intelligence to come under his command, he complied with a direct order from General Marshall to join the club and play according to the rules.

Lawyers, so much involved in intelligence during

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Book Reviews

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the war, should be fascinated to read of its history and the key part the legal profession played in its development from Pearl Harbor to the Japanese surrender in Tokyo Bay.

Operation Zapata by Luis Aguilar, University Publications of America, Inc., 1981

This book largely consists of the report commissioned by President Kennedy on April 22, 1961, to look into the failure of the Bay of Pigs invasion on April 15, 1961.

The board of inquiry consisted of General Maxwell D. Taylor (then assisting President Kennedy at the White House), Attorney General Robert Kennedy, Chief of Naval Operations Admiral Arleigh Burke, and Director of Central Intelligence Allen Dulles. Inasmuch as those named had played leading parts in the drama, and as the final decisions were taken by the president and his appointees, a thorough fault-finding inquiry was impossible (as it was, and remains, difficult to investigate yourself and your present boss in the dispassionate manner required in any such inquiry).

The report found that the project, as originally planned in the CIA, was to prepare and infiltrate a small guerrilla force into Cuba, that it grew (somehow) into a scheme to land an amphibious paramilitary force, and that this was approved by President Kennedy so long as it could not be traced to the United States, and that failure was preferable to disclosure. (The idea that any military forces with air cover and naval support could not be traced to its sponsor nation is a bizarre idea in itself.) The Joint Chiefs, who were shown the CIA plan piecemeal, recommended another site for the landing (which Secretary of Defense McNamara did not pass on to the president), and rated the chances of success as "fair." Nevertheless the project was approved by the president.

In any event, command and control remained in Washington with the president, the secretary of state, and many presidential assistants. The lack of an overall commander on the spot to prevent the normal confusion of war from becoming disorganized, the withdrawal of the unmarked naval forces and the air strikes at the last moment for fear of disclosure (leaving Castro free rein to shoot down the supporting CIA World War II transport planes and bombers with his miniscule but modern airforce) because such use could have been traced back to the United States, and the poor logistical support to the forces that had been landed, all contributed to the debacle. Further, contrary to what President Kennedy had been told, the marshy ground offered no hope for the invaders to become guerrillas if the invasion failed. Almost all of the force were soon captured and revealed the role of the United States.

Larry Williams

Workshop Explores Legal Issues Related to Use of Outer Space

Editor's Note: The Standing Committee on Law and National Security and The University of Mississippi Law Center on May 7-8 cosponsored a Law Professor Workshop, "Law and National Security in Outer Space," which was extremely well received by its law professor and other participants. The workshop, benefitting from the current interest generated by the space shuttle program, attracted considerable local, regional and national coverage. Apart from radio and television, there was detailed press coverage on the substance of the workshop. The following University press release provided the basis for that coverage.

UNIVERSITY, Miss.—Giant solar satellites capable of providing Earth with an inexhaustible energy source, manned space stations, factories and scientific laboratories in space, telecommunications satellite farms—all these are in the foreseeable future for outer space, according to speakers at the recent "Law and Security in Outer Space" symposium at The University of Mississippi Law Center.

As the participants from across the United States and Europe have discovered, such complicated technological advances can also result in complex legal and political questions. The Standing Committee on Law and National Security and the International Law Section of the American Bar Association, in cooperation with the Ole Miss Law Center, provided a two-day forum for American law professors and international legal, scientific and military authorities to explore in depth such major issues confronting users of outer space.

As speaker Ken Pedersen, director of International Affairs for the National Aeronautics and Space Administration (NASA) observed, "One of the signs of a growing maturity in space is that it's no longer just an arena for spectacular kinds of things but it's become a working environment."

The major forum for developing a body of principles and rules pertaining to man's activities in outer space has been the United Nations Committee on the Peaceful Uses of Outer Space, which has been instrumental in drafting five major international agreements. The symposium's organizer, Ole Miss law professor Dr. Stephen Gorove, who is the International Astronauti-

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Workshop on Use of Outer Space

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cal Federation's delegate to this UN Committee, began the symposium by listing the major unresolved space issues still confronting the U. S. They include remote sensing of Earth from space, direct television broadcast by satellites, definition and/or delimitation of "outer space" and outer space activities, questions relating to the Geostationary Orbit, and the use of nuclear power sources in outer space. These subjects were also the ones most frequently dealt with by workshop speakers, in addition to discussion about demilitarization of space and the potential and problems for use of space by private industry.

Roy Gibson, former Director-General of the European Space Agency (ESA) and now a London aerospace consultant, reminded participants that "our concern should be to ensure that the regulation making keeps pace not only with technological progress but also with practical needs."

Many speakers remarked on the future of outer space. Space shuttle astronaut Major Bryan O'Connor predicted that NASA's next goal will be the establishment of an orbiting space operation center, which would be permanently manned, with the space shuttle serving as a bus for staff and materials. Such a space station, which could be operational by the 1990's, would be used to repair, refuel and even construct space vehicles.

A solution to Earth's energy problems could be found in the construction of grid-like solar power satellites (SPS), covering approximately a 50-square-mile area in space. According to Paul Dembling, former general counsel for NASA and the General Accounting Office, the sun's energy would be transmitted from the photovoltaic cells of the SPS in the form of microwaves to ground stations on Earth, where it would be transformed back into electricity for use in the national grid. "This would produce twice the usable power generated by America's largest hydroelectric dam and it is calculated that 45 of these fully operational structures would match the current electrical generating power of the U. S." Though start-up costs would admittedly be enormous, several proponents of SPS contended that this outlay for an inexhaustible resource would be less than the U. S. must now pay over a comparable 15-25 year period for energy from such conventional sources as oil, gas, and coal.

Private industry is also looking to space. Retired Army Lt. Gen. Daniel O. Graham heads a team of scientists, space engineers, strategists and economists who propose a national strategy for defense and economic development in space called High Frontier. He envisions "space labs and factories to make stronger alloys, clearer glass for fiber optics, purer crystals for microelectronics, perfectly spherical ball bearings, and new wonder drugs whose manufacture is possible only in the pristine environment of space."

A speaker representing private industry predicted that the extent to which private firms would use outer space is "the extent to which they can feel secure doing so." One cause of concern is the large amount of space debris and other objects already in space, a total of 4,651 items in April 1982, according to New York lawyer and former U.N. delegate Edward R. Finch Jr., who warns, "We must never forget that in outer space simple debris can become a very serious high velocity weapon of destruction of other satellites." He and others support regulations that would require the responsible parties to dispose of no longer functional space objects, possibly by using the space shuttle to tow them to an orbit where they will burn.

Other weapons in space were a major topic of the symposium. Although treaties prohibit the stationing of nuclear and other weapons of mass destruction in space, other military hardware isn't precluded. Efforts are continuing, however, to expand weaponry limitations. Norman Wulf, deputy general counsel for the U. S. Arms Control and Disarmament Agency, estimated that "70 percent of the Soviet space systems serves a purely military role and they continue to develop and test an ASAT (the generic term for any device capable of destroying satellites in earth orbit)." To improve satellite survivability in the face of this threat, the U. S. also is working on an ASAT capability.

Satellites are of prime importance in verification of arms control agreements as well as in international telecommunications. Ronald Stowe, director of government and international affairs for Satellite Business Systems, foresees problems developing over the use of the Geostationary Orbit, the area 22,300 miles above the equator where satellites rotate at the same speed as Earth, making them stationary and ideally located. He predicts strong moves by developing nations at the 1985 World Administrative Radio Conference (WARC) to assign specific slots and frequencies in the orbit to each country desiring them, whether they now have satellite capabilities or not. "Such subdivision could result in the U. S. common carriers and telecommunications users being precluded from—or having to pay greatly enhanced prices in order to use—orbital and spectrum resources not actually needed at that time by anyone else."

Symposium participants expected compromise on this issue, as is frequently the case with regulations and agreements governing space use, and predicted the results of such conferences as WARC would be the subject of future space law workshops.

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Intelligence Identities Protection Act

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Weiss in opening his remarks said, "I pity the poor courts after listening to the colloquy today."

Actually the colloquy was not all that confusing. No supporter of the legislation rose to take issue with the interpretation placed on its intent by McClory and Hyde.

There were numerous tributes to Representative John Ashbrook, who died several months ago. It was Ashbrook who was primarily responsible for changing the language of section 301(c) so that the United States government would not have to prove an "intent" to "impair or impede the foreign intelligence activities of the United States" in order to obtain a conviction. The Ashbrook amendment, which carried overwhelmingly in the House, and has now become law, replaces the intent standard with a more objective standard which requires that the disclosure must be *"in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States."*

Virtually all of the speakers made reference to the major role which Ashbrook had played in helping to shape the course of the legislation.

Debate in the Senate

In the Senate, the debate on the conference report was kicked off by Senator John Chafee (R-R.I.), principal sponsor of the measure. In his opening remarks, Chafee said:

> The bill before us today has wide support but has been delayed over the misperception that it might interfere with first amendment rights of Americans. Well, the first amendment rights of the news media were carefully considered and, as a result, the bill will protect those rights while allowing for the prosecution of those who disclose the names of agents.

Senator Strom Thurmond (R-S.C.) joined Chafee in emphasizing that the bill was not intended to restrict first amendment rights. He noted that the bill is "not intended to apply to members of the press or others engaged in legitimate activities protected by the first amendment. It *is* intended, however, to stop those people who are in the business of naming names of our covert agents."

Senator Daniel P. Moynihan (D-N.Y.), one of the four Senators to vote against the measure, said that he opposed it with regret because of his conviction that a major provision of the bill, section 301(c), is unconstitutional.

Senator Alan Cranston (D-Calif.) spoke in support of the measure and noted that in the case of the section dealing with the matter of cover, he had offered an amendment which had led to a substitute section 603 insisting on the exemption of the Peace Corps as an instrument of cover and he was "pleased to report that this understanding was fully adhered to by the conference."

* * *

In view of the strong opposition to H.R. 4 by most of the media, by the ACLU and other civil liberties organizations, the chances are that the battle for H.R. 4 is far from over, and that it will soon face some stiff tests in the United States courts. Indeed, on the day that the bill was signed into law, the ACLU announced that it would in the near future file suit to test the constitutionality of the law.

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